

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

KELLEY DENK,

Plaintiff,

vs.

Case No. 2004-4281-NH

JEFFREY C. MARDEROSIAN, D.D.S.  
and PROFESSIONAL ENDODONTICS,  
P.C., a Michigan professional corporation,

Defendants.

OPINION AND ORDER

Plaintiff has filed a motion for attorney fees and costs.

This matter was submitted for case evaluation on September 19, 2005. The evaluators unanimously awarded plaintiff \$75,000, which plaintiff accepted and defendants rejected. The case proceeded to trial and the jury awarded plaintiff \$155,876.00 on March 10, 2006. This Court entered the Judgment in this matter on March 31, 2006. The Judgment provided, inter alia, that plaintiff was the prevailing party in this lawsuit, since the jury's adjusted verdict was 10% more than the case evaluation award. The Judgment also provided that plaintiff, "as prevailing party, may request her actual costs incurred in connection with the prosecution of this action together with a reasonable attorney fee as determined by this Court for services necessitated by [defendants'] rejection of the case evaluation as provided by and subject to Court rule."

When a court determines that case evaluation sanctions are appropriate, the actual costs to be charged are the costs taxable in any civil action plus a reasonable attorney fee. MCR 2.403(O)(6); *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 81; 577 NW2d



150 (1998). The amount of case evaluation sanctions the trial court awards is reviewed for an abuse of discretion. *Ayre v Outlaw Decoys, Inc*, 256 Mich App 517, 520; 664 NW2d 263 (2003). An abuse of discretion is found where an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761-762; 685 NW2d 391 (2004).

In support of her motion for case evaluation sanctions, plaintiff claims that, from the effective date of defendants' rejection of the case evaluation through the present, she has incurred substantial costs and attorney fees. Plaintiff requests \$49,250.00 in attorney fees, \$279.50 for the fees of a paralegal, and \$9,031.72 in costs. Plaintiff therefore seeks a total of \$58,561.22 in case evaluation sanctions.

In response, defendants argue that there is no statutory basis for recovering many of the itemized costs which plaintiff requests. Defendants also claim that the expert witness fee requested by plaintiff is unreasonable. Defendants note that they do not object to the costs associated with witnesses Robert Fee, Michelene Riley, Kenneth Shaheen, Michael Busuito or Beaumont Hospital insofar as these costs are limited to the statutory allowance of \$12.00 plus mileage, not exceeding \$15.00 per witness per day. Finally, defendants aver that the attorney fees requested by plaintiff are excessive since the hours spent and the hourly rates requested by plaintiff are excessive.

Turning to the case at bar, the Court notes that "[t]he power to tax costs is wholly statutory; costs are not recoverable where there is no statutory authority for awarding them." *Herrera v Levine*, 176 Mich App 350, 357; 439 NW2d 378 (1989). In the case at bar, the Court is aware of no statutory basis for awarding costs for service of process fees, medical records,

travel, photocopying charges, telephone toll charges, miscellaneous items,<sup>1</sup> overnight or express mail charges, postage charges, facsimile costs, photograph duplication costs, or messenger fees. These costs constitute \$3,394.25 of plaintiff's total requested costs, and plaintiff's request for these costs must be denied.

The Court also agrees with defendants' contention that any witness fees must necessarily be limited to \$12.00 per day plus mileage, not to exceed \$15.00 per witness, pursuant to MCL 600.2552(1). However, the witness or subpoena fees plaintiff requests do not specify the mileage of each witness, and in some cases, the total fee apparently exceeds the permissible limit of \$15.00 per witness per day. Therefore, the Court shall hold plaintiff's request for subpoena fees in abeyance, pending receipt of a clarification of the mileage incurred by each defendant, and an explanation of fees associated with certain witnesses which appear to exceed the statutory limit.

Based on the bill of costs which plaintiff has presented, the Court is also unable to determine the deposition fees, if any, that she is entitled to receive. MCL 600.2549 provides that "[r]easonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used." Therefore, "[a]ny documents that were not 'recorded or filed in any public office' or 'necessarily used' are . . . outside the ambit of MCL 600.2549." *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 550 NW2d 580 (1996). There is no indication of whether the

---

<sup>1</sup> According to plaintiff's bill of costs, miscellaneous costs include \$295.00 for "verbatim audio & visual com" and \$20.00 for "Ronald DeNardis."

depositions at issue in this matter were filed in any clerk's office or necessarily used in the underlying case. Therefore, the Court holds plaintiff's request for deposition costs in abeyance, pending receipt of an explanation as to whether the depositions at issue were filed in any clerk's office and either read into evidence or necessarily used.

Likewise, the Court is unable to determine, based on the bill of costs, whether the \$2,850.00 representing the plaintiff's expert witness' fee was excessive. The Court notes that an expert witness should not be compensated for time spent "educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position." *Detroit v Lufan Co*, 159 Mich App 62, 67; 406 NW2d 235 (1987). Plaintiff's expert witness fee is referenced in plaintiff's bill of costs, but there is no itemization of the services the expert rendered in earning this fee. Therefore, the Court believes that plaintiff's request for this fee must be held in abeyance pending an itemization of the services provided by plaintiff's expert witness.

Motion fees are generally compensable as taxable costs. *Put v FKI Industries, Inc*, 222 Mich App 565, 573; 564 NW2d 184 (1997) (citations omitted). The Court therefore finds that plaintiff is entitled to \$60.00 for the motion fees it incurred as a result of defendants' rejection of the case evaluation.

The Court shall now address plaintiff's request for attorney fees. A reasonable attorney fee must be based on a reasonable hourly or daily rate for services necessitated by the rejection of the evaluation. MCR 2.403(O)(6)(b); and see *Zdrojewski v Murphy*, 254 Mich App 50, 71-72; 657 NW2d 721 (2002) (citations omitted). In determining a reasonable hourly rate, the trial court should consider relevant criteria, including "the professional standing and experience of the

attorney; the skill, time and labor involved; the amount in question and the results achieved; the difficulty of the case; the expenses incurred; and the nature and length of the professional relationship with the client." *Temple v Kelel Distributing Co, Inc*, 183 Mich App 326, 333; 454 NW2d 610 (1990). It is important to note that "reasonable fees are not equivalent to actual fees charged." *Zdrojewski, supra* at 72.

In the present case, plaintiff requests 134.90 hours in attorney fees at \$350.00 per hour, 4.20 hours in attorney fees at \$275.00 per hour, one hour in attorney fees at \$250.00 per hour, 2.80 hours in attorney fees at \$225 an hour, and 4.30 hours for paralegal fees at \$65.00 per hour. As a preliminary matter, plaintiff's request for paralegal fees must be denied, since paralegal fees are considered a part of the overhead included in a reasonable attorney fee and are therefore excluded from taxable costs. See *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 180-182; 568 NW2d 365 (1997).

Turning to the attorney fees themselves, the Court does not believe that 142.90 hours was a reasonable amount of time spent on this matter. The Court notes that plaintiff's attorney has documented the actual time spent on this matter. However, bearing in mind that reasonable fees are not equivalent to the actual fees charged, the Court is satisfied that 80 hours is a reasonable amount of time to spend on a medical malpractice case of this complexity.

Further, the Court has carefully considered factors relevant to the calculation of a reasonable hourly rate, including, inter alia, the fees of other attorneys in Southeastern Michigan; the skill, time and labor involved; the damages in question; the difficulty of the issues presented in this case; and the expenses incurred by plaintiff's attorney. Having done so, the Court is satisfied that \$175.00 per hour is a reasonable hourly rate in this matter. Therefore, the Court finds that plaintiff is entitled to attorney fees of \$14,000.00.

For the reasons set forth above, plaintiff's motion for attorney fees and costs is GRANTED in part, and defendants are ORDERED to pay plaintiff \$ 14,060.00 for attorney fees and motion fees. Plaintiff's requests for witness/subpoena fees, deposition costs, and expert witness fees are ORDERED held in abeyance, pending receipt of detailed records pertaining to each of these costs. Plaintiff is ORDERED to provide the Court with these detailed records within 14 days. Plaintiff's other requests for costs and fees are DENIED. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.



JAMES M. BIERNAT, Circuit Judge

JMB/kmv

DATED: June 30, 2006

cc: Barbara A. Patek, Attorney at Law

Ronald DeNardis, Attorney at Law

Keith P. Felty, Attorney at Law

Gary N. Felty, Attorney at Law